

Re KL (A Child) [2013]

[2013] UKSC 75

04/12/2013

Barristers

Henry Setright KC
Teertha Gupta KC
Michael Gration KC
Michael Edwards

Court

Supreme Court

Practice Areas

International Children Law

Summary

It was appropriate for the court to make an order under its inherent jurisdiction for the return of a seven-year-old boy to the United States, partly because the boy's father had brought a successful appeal in the US against a Hague Convention order allowing the mother to take the child to England.

Facts

The appellant father (F) appealed against a ruling ([\[2013\] EWCA Civ 865](#), [\[2013\] 3 F.C.R. 69](#)) upholding a decision that he was not entitled to a return order in relation to his seven-year-old son (K).

F and the respondent mother (M) were of Ghanaian heritage. F was a citizen of the United States and intended to remain there. M had spent most of her life in England. The parties married in Texas in 2005 but the marriage broke down in 2008. In July 2008, M removed K to London, where they remained until February 2010, when she was ordered to return K to Texas for the purpose of completing the divorce proceedings begun by F. At a custody hearing held in Texas in March 2010, the judge decided that it was in K's best interests that F should have the exclusive right to designate his primary residence. After the hearing, K remained living with F until August 2011. M applied to the United States Federal District Court for an order under the Hague Convention on the Civil Aspects of International Child Abduction 1980; the court acceded to her application and in August 2011 K flew with her to England, where he had resided ever since. In November 2011, M obtained a residence order on a summary basis. F brought a successful appeal against the decision of the Federal District Court. In July 2012, the US Court of Appeals held, among other things, that it had been established that K's presence in the United Kingdom was to last for a limited duration and that F had never agreed to any other arrangement. In August 2012, the US District Court made an order requiring M to return K to F in the US and thereafter to comply with the terms of the Texan court's order; she failed to do so. In the instant proceedings, F had asserted that M's retention of K in this country after the District Court's order of August 2012 was wrongful; that contention depended on

whether K was still habitually resident in Texas on that date. F alternatively asserted that the court should exercise its inherent jurisdiction to return K, even if not required to do so under the terms of the Convention. His case was rejected by the judge and, on appeal, by the Court of Appeal.

Held

(1) The essential features of the test adopted both by the European Court of Justice and by the instant court were that habitual residence was a question of fact which should not be glossed with legal concepts which would produce a different result from that which a factual inquiry would produce. The judge at first instance had been entitled to hold that K had become habitually resident in England and Wales by August 2012. M was coming home. This was where she had lived and worked before her short-lived marriage to F and where she intended to stay. This was where she had a child by another relationship, who was now living with her and K. Neither she nor K would have perceived the return here as in any way temporary. From K's point of view, this was where he had lived for some 20 months before his return to the US in February 2010. This was where he became integrated into a social and family environment during the 11 months when he lived here before the US Court of Appeals' judgment of July 2012 (see paras 20, 26-27 of judgment). (2) As to F's reliance on the court's inherent jurisdiction, the correct question was whether it was in K's best interests to remain in this country so that the dispute between his parents could be decided here or to return to Texas so that the dispute could be decided there. It had long been established that, in the interests of international comity, the existence of an order made by a foreign court of competent jurisdiction was a relevant factor. There were factors both in favour of K's return and against it. However, it would be appropriate to order his return. The crucial factor was that this was a Texan child who was currently being denied a proper opportunity to develop a relationship with his father and with his country of birth. For as long as the Texan order remained in force, M was most unlikely to allow, let alone to encourage, K to spend his vacations in the US with F. While conflicting orders remained in force, he was effectively denied access to his country of origin. Nor had M been exactly enthusiastic about contact here. The best chance that K had of developing a proper relationship with both his parents, and with the country whose nationality he held, was for the Texas court to consider where his best interests lay in the long term. It was necessary to restore the synthesis between the two jurisdictions, which M's actions had distorted (paras 28, 32, 34-38).

Appeal allowed

Permission

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